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[redacted] COMPANY,

Petitioners,

[redacted]

ARKOMA ASSOCIATES,

Respondent.

[redacted]

[redacted]
[redacted] Court of Appeals
[redacted] Circuit

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QUESTION PRESENTED FOR REVIEW

Whether diversity jurisdiction is destroyed if a limited partner of a plaintiff limited partnership is a citizen of the same state as the defendants.

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No. 88-1476

In The

Supreme Court of the United States

October Term, 1988

C.T. CARDEN, LEONARD L. LIMES, AND MAGEE DRILLING COMPANY,

Petitioners,

versus

ARKOMA ASSOCIATES,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. art. III, §2, which states in pertinent part: "The judicial Power shall extend to . . . Controversies . . . between Citizens of different States."

STATEMENT OF THE CASE

Respondent amends petitioners' statement of the case to include the following:

The case was tried on the merits, judgment was rendered in favor of Arkoma, and the complaint of intervention filed by Magee Drilling Company was dismissed.

SUMMARY OF ARGUMENT

Diversity jurisdiction derives from Article III of the Constitution and was first vested in the federal courts by the Judiciary Act of 1789. Diversity jurisdiction has evolved from the requirement of "complete diversity" in *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806), to the grant of entity status to corporations for diversity purposes in 28 U.S.C. §1332(c).

Just as the Supreme Court's treatment of corporations for jurisdictional purposes has evolved, so has the Court's examination of different types of unincorporated associations. In *Chapman v. Barney*, 129 U.S. 677 (1889), and *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449 (1900), the Court held that because these unincorporated associations were not corporations, the citizenship of each of their members must be considered for purposes of diversity jurisdiction. Approximately thirty years later, the Supreme Court was faced with a different type of unincorporated association in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). In *Russell*, the Court examined the *sociedad en comandita*, an unincorporated association organized under Puerto Rican law, and determined that the

sociedad's characteristics were so similar to that of a corporation that the *sociedad* would be granted entity status for purposes of diversity jurisdiction.

Approximately thirty years after *Russell*, the Supreme Court examined the citizenship of a labor union in *United Steelworkers of America, ALF-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965). The Court held that the citizenship of all of the members of the union would be considered for purposes of diversity jurisdiction because the national as well as local flavor of the labor union made it difficult to fashion a test for determining its citizenship.

Just nine years ago, the Supreme Court in *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980), examined yet another type of unincorporated association, a business trust. The Court reviewed the features of the trust and determined that only the citizenship of the trustees would be considered because, given their degree of control in the trust, they were the real parties to the controversy.

The modern limited partnership is a unique unincorporated association in that it is formed by compliance with statutory requirements and has its basis in a uniform act which has been codified in forty-nine states (Louisiana incorporates components parts). The Uniform Limited Partnership Act imposes certain limitations upon limited partners who wish to retain their limited liability while, at the same time, granting all of the powers of management and control to the general partners.

Because of certain financial advantages, the modern limited partnership has emerged as an alternative to the public corporation. Many limited partnerships consist of

hundreds or thousands of limited partners, are registered with the Securities and Exchange Commission, and traded in public markets. Limited partnerships are used as investment vehicles because of their unique ability to utilize various tax losses and deductions generated by the limited partnership to offset income from other sources. Limited partnerships have been involved in a wide range of ventures encompassing almost every type of business undertaking.

The modern limited partnership is significantly different than the unincorporated associations found in the early cases of *Chapman* and *Great Southern* and the labor union in *Bouligny*. However, the modern limited partnership enjoys significant similarity to corporations, the *sociedad* in *Russell*, and the business trust in *Navarro*. Because the modern limited partnership has a functionally similar structure to other types of organizations that have access to federal courts, basic fairness and substance over form require that limited partnerships receive similar treatment.

The reasons for diversity jurisdiction, avoidance of local prejudice to out-of-state litigants, availability of federal procedural advantages, achievement of uniformity of decision in commercial law, conflicts of law, and international law, are distinctly applicable to the modern limited partnership. Therefore, the modern limited partnership should be granted citizenship for diversity purposes either as an "entity" by using the rationale set forth in *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1854), or by considering only the citizenship of the

general partners under the real parties to the controversy test set forth in *Navarro*.

Analysis of the Limited Partnership Agreement of Arkoma Associates, an Arizona limited partnership governed by the Uniform Limited Partnership Act (1976) which that state has adopted, mandates that under the application of the real parties to the controversy test, the general partners constitute such real parties for purposes of diversity jurisdiction. The limited partnership agreement provides that the general partners have exclusive and complete management and control of the operations of the partnership and have the power to do anything necessary to further the purposes of the partnership. Conversely, the limited partners do not have the right to control, manage, or transact any business for the partnership or the power to sign for or bind the partnership in any business transactions. Even though the limited partners do possess certain non-managerial rights, these are negligible when compared to the overwhelming scope of control maintained by the general partners. Accordingly, only the general partners are the real parties to the controversy and only their citizenship should be considered for purposes of determining diversity jurisdiction.

ARGUMENT

I. HISTORY OF DIVERSITY JURISDICTION

Specific authority for diversity jurisdiction derives from Article III of the Constitution, which provides, *inter alia*, that "[t]he judicial Power shall extend to . . . Controversies . . . between Citizens of different States." U.S.

Const. art. III, §2. Diversity jurisdiction was first vested in the federal courts by the Judiciary Act of 1789. This Act, passed by the First Congress, provided for federal jurisdiction if a "suit is between a citizen of the State where the suit is brought, and a citizen of another State." Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73, (1789-1799). Unfortunately, Congress failed to define the term "citizen" which, to this day, remains a source of controversy.

The first case to address the issue of diversity jurisdiction was *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806) which required "complete diversity" among "citizens" of different states. The conclusion reached by most courts and commentators is that "complete diversity" is not a constitutional mandate. *See, e.g.*, American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, §1301(b)(2), Supporting Memorandum A (1969) and *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (both supporting conclusion that *Strawbridge* did not hold that the Constitution requires complete diversity). This conclusion is based on a comparison of the language between the Judiciary Act of 1789 and the Constitution. The texts differ in a crucial aspect: "the statute spoke of 'the suit' being between diverse citizens, the Constitution of 'controversies' between them. The former might . . . be read to require 'complete diversity' in the entire suit, while the latter [merely] authorized Congressional conferral of jurisdiction over any case containing a controversy between citizens of different states." American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Court*, Supporting Memorandum A at 427.

As further evidence that the "complete diversity" concept is not constitutionally based, Congress has made statutory exceptions to the "complete diversity" rule, as in the case of statutory interpleader,[1] which "has been uniformly construed to require only 'minimal diversity,' that is, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens." *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. at 530 (footnote omitted).

Furthermore, Rule 23 of the Federal Rules of Civil Procedure also permits an escape from the demands of complete diversity. If the parties comprise an appropriate class, only the citizenship of the named representatives of the class will be considered, even though the citizenship of other members of the class would destroy complete diversity. *See* C. Wright, *The Law of Federal Courts* 306, 314-15 (2d ed. 1970).

Finally, in the case of ancillary jurisdiction, federal courts may decide a controversy without reference to the citizenship of the ancillary parties, although neither the Constitution nor the statutes confer such jurisdiction. *Id.* at 19.

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[1] 28 U.S.C. §1335 (1982). Rule 22 of the Federal Rules of Civil Procedure defines "interpleader" as follows:

> (1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. . . .

Since neither the Supreme Court nor Congress has addressed the issue of the citizenship of limited partnerships, it is necessary to first examine the historical treatment of corporations and unincorporated associations. The Supreme Court first considered the problem of corporate citizenship in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809). Three years after its decision in *Strawbridge*, this Court held that although a corporation, as a distinct legal entity, was not a citizen within the meaning of the Constitution or the Judiciary Act, it could invoke diversity jurisdiction on the basis of the citizenship of its individual corporate shareholders. If the citizenship of all of the shareholders was different than the citizenship of any opposing party, the corporation could litigate in federal court. *Id.*

With the growth of interstate commerce and the increase in the number of corporations and shareholders, the requirement of complete diversity for all shareholders effectively precluded many corporations from invoking the diversity jurisdiction of the federal courts. Responding to that problem and noting the widespread criticism of the *Strawbridge* and *Deveaux* decisions, the Supreme Court, in *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844), held that for jurisdictional purposes, a corporation was an artificial entity and should be deemed a citizen of the state of its incorporation. The Court's theory of corporate citizenship evolved further in *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. (16 How.) 314 (1854). There, the Court created the fiction that, although a corporation was not considered a citizen for diversity purposes, its shareholders would be conclusively presumed to be citizens of the incorporating

state. The Court noted that although a corporation is not itself a citizen, one who deals with a corporation does not deal with a "mere metaphysical abstraction," but with directors and officers, the representatives of the shareholders. *Id.* at 327. The Court then addressed the propriety of determining jurisdiction on the basis of the citizenship of the shareholders who exercise no control over the litigation:

> [R]epresentatives of numerous unknown and ever-changing associates should [not] be permitted to allege the different citizenship of one or more of these stockholders, in order to defeat . . . [jurisdiction]. It is true that these stockholders are corporators, and represented by this "juridical person," and come under the shadow of its name. But for all the purposes of acting, contracting, and judicial remedy, they can speak, act, and plead, only through their representatives or curators.

Id. at 328.

Although the reasoning of *Marshall* differed somewhat from that of *Letson*, the result reached was identical and corporations were deemed to be citizens of the state of their incorporation.[2]

The *Marshall* rule was codified by Congress over 100 years later in 1958 and now appears in 28 U.S.C. §1332(c) (1982). When discussing this statute, the Senate Judiciary Committee stated: "It is now an established doctrine that a corporation, for the purposes of jurisdiction, is

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[2] Apparently, the Court was not concerned that its decision touched a constitutional note or that it was stepping on congressional toes as it undertook to interpret *Strawbridge* without a constitutional argument or amendment.

deemed a citizen of the State in which it is incorporated." S. Rep. No. 1830, 85th Cong., 2d Sess. 5, *reprinted in* 1958 U.S. Code Cong. & Ad. News 3099, 3101. Thus, Congress adopted the "entity"[3] theory for corporations and recognized the power of the courts to interpret the citizenship of organizations in the absence of a definitive statute. Furthermore, there is no suggestion in the legislative history of the 1958 amendment that Congress desired to preclude adoption of an "entity" theory for business entities other than corporations. *See generally id.* Absent congressional preclusion, the federal courts are free to determine whether certain types of unincorporated associations should be deemed "citizens" for diversity purposes. *See Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933); *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922); *Arbuthnot v. State Auto. Ins. Ass'n*, 264 F.2d 260 (10th Cir. 1959); *American Fed'n of Musicians v. Stein*, 213 F.2d 679 (6th Cir. 1954), *cert. denied*, 348 U.S. 873 (1954). Congress, of course, remains free to restrict or modify any judicial extensions which it deems unwise. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 344-45 (1943), *reh'g denied*, 320 U.S. 214 (1943) (Frankfurter, J., dissenting) (Congress, not the Court, has discretion to restrict

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[3] The "entity" theory, developed in *Letson* and *Marshall* and codified in 28 U.S.C. §1332(c) regarding corporations, provides the basis for treating a business organization as a separate citizen for purposes of diversity jurisdiction. On the other hand, the "aggregate" theory, sometimes referred to as the "persons composing" theory set forth in *Chapman* and *Great Southern, infra* pp. 11-12, requires that the citizenship of each member of certain unincorporated associations be considered to determine diversity jurisdiction.

diversity jurisdiction). While the Supreme Court and Congress have set out precise guidelines to determine the citizenship of corporations, the rules surrounding unincorporated associations are not as clear.

As the universe of unincorporated associations contains several distinct and different variations thereof, commercial reality and policy considerations require a separate examination and determination for each type of entity. *Chapman v. Barney*, 129 U.S. 677 (1889), has been labeled the leading case construing the citizenship of a 19th century unincorporated association. In *Chapman*, the Supreme Court held that a joint stock company,[4] even though it could bring a lawsuit in the name of its president, could not be a citizen of the State of New York for diversity purposes. The Court failed to examine the characteristics of the stock company to determine whether it qualified under the *Marshall* rationale. Rather, the Court reasoned that since state law did not label the joint stock company a corporation, it did not qualify for entity treatment. *Id.*

Over a decade later, the Supreme Court appeared to affirm *Chapman* in *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449 (1900). In *Great Southern*, the Supreme

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[4] A joint stock company is a capital-pooling privately formed entity which, like a corporation, has centralized management and transferrable shares. However, unlike a corporation, a joint stock company is an entity formed pursuant to agreement of the parties rather than by grant of authority by its state of organization, and it does not provide limited liability for its members which consist of only one class. *See* J. Crane & A. Bromberg, *Law of Partnership* 178-81 (1968). *See also Wroblewski v. Brucher*, 550 F.Supp. 742, 751 (W.D. Okla. 1982).

Court applied the *Chapman* reasoning to what was then called a "limited partnership association."[5] Writing for the majority, Justice Harlan held that the *Great Southern* limited partnership association was not a corporation under the law of its state of organization, and that its capacity to sue in the association's name did not serve to qualify the association as a corporation. Consequently, the Court relegated the *Great Southern* type limited partnership association to aggregate treatment. *Id.*

In 1933, the Supreme Court encountered another form of unincorporated association in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). *Russell* addressed the question of whether a *sociedad en comandita*, an unincorporated association organized under Puerto Rican law, could be treated as a citizen for purposes of diversity. The Court examined the *sociedad*'s essential characteristics in light of the law under which the association was created. The Court then determined that those features entitled it to treatment similar to that given to corporations for diversity purposes. The *Russell* Court distinguished *Chapman* and *Great Southern* by suggesting that the associations in those cases lacked sufficient legal personality

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[5] A limited partnership association, like a joint stock company, had characteristics of both a corporation and a partnership. Like the joint stock company in *Chapman*, the limited partnership association in *Great Southern* had centralized management and transferability of shares. However, unlike the modern limited partnership, the limited partnership association in *Great Southern* had only one class of partner. Each partner subscribed to part of the capital and none had personal liability for the association's debts. *See generally* J. Crane & A. Bromberg, *Law of Partnership* at 151-53. *See also Wroblewski v. Brucher*, 55 F.Supp. at 751.

and, therefore, were undeserving of characterization as entities for purposes of diversity jurisdiction. *Id.* In its comparison of the *sociedad* to a corporation, the Court found many characteristics of the *sociedad* important.[6]

Russell reveals that the Supreme Court will examine each form of unincorporated association to determine how the citizenship of that organization should be determined for diversity jurisdiction purposes. *Russell* rejected the notion that *Chapman* requires the citizenship of each member of all unincorporated associations to be considered for diversity jurisdiction purposes. Also, *Russell*

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[6] [The *sociedad*] may contract, own property and transact business, sue and be sued in its own name and right. Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant. It is created by articles of association filed as public records. Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*. Its members are not primarily liable for its acts and debts, and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital. Although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them, this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states.

Id. at 481 (citations omitted).

reflects the Supreme Court's willingness to look beyond the incorporated/unincorporated dichotomy and to study the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue, to determine diversity of citizenship. *Id.*[7]

United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) was the next Supreme Court decision to deal with yet another type of unincorporated association, a labor union. After studying the particular unincorporated entity involved, the Supreme Court, in *Bouligny*, held that a labor union should not be treated like the *sociedad* in *Russell* but rather like the joint stock company in *Chapman* and the limited partnership

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[7] In *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964), the Second Circuit interpreted *Russell* as a departure from the "label denominating tradition" of *Chapman*. *Id.* at 399. The court held that a joint stock association, organized and existing under New York law, was a citizen of that state for purposes of federal diversity jurisdiction. The court explained:

> It is our considered judgment . . . that the Supreme Court has abandoned the artificial and mechanical rule of Chapman v. Barney in favor of a more flexible test for capacity for citizenship, a test which demands that consideration be given to whether an organization's essential characteristics sufficiently invest it, like a corporation, with a complete legal personality distinct from that of the members it represents. And as we are convinced that a New York joint stock association such as this defendant has been legally endowed with essential characteristics that make it resemble a corporate entity much more than a mere aggregation of individuals, we reverse.

Id. at 393.

association in *Great Southern*. Because of the difficulty in trying to determine the citizenship of labor unions that have local as well as national flavor, the Court was unable to grant entity status to the labor union involved and reserved that determination for Congress. *Id.*[8]

The Court's discussion of the limitations of the judicial role in *Bouligny* can be restricted to the facts of the case. First, the Court's discussion of the difficulty of fashioning a test for labor union citizenship explains why the Court felt that only Congress could extend entity citizenship to labor unions. Second, while the *Bouligny* Court twice referred to *Mason*,[9] it never expressly discredited the *Mason* holding, thus limiting *Bouligny* to labor unions. Third, the Court's deference to Congress is understandable because of the great body of federal labor law created by Congress.

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[8] *Bouligny* has been criticized because Justice Fortas failed to explain why the Court, which historically had figured so prominently in the interpretation and application of the diversity jurisdiction provisions, felt constrained to defer to Congress on the issue of labor union citizenship. As one commentator has observed:

> In view of the Court's initial willingness to find a niche for corporations in the diversity statute this deference to Congress is remarkable. The application of statutes to situations not anticipated by the legislature is a pre-eminently judicial function, and the Court's refusal to decide constituted a decision against jurisdiction without considering the relevant arguments.

Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 35 (1968).

[9] *Mason, supra* note 7, at 14.

The next and most recent Supreme Court case to address the issue of citizenship of an unincorporated association was *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980). In *Navarro*, the Court examined the citizenship of an express business trust[10] created under New York law. It held that the citizenship of the trustees, rather than that of the beneficiaries would control. The Court found that the fact that the trustees were the real parties to the controversy was particularly relevant in determining diversity jurisdiction. *Id.*

The Court applied its long standing rule[11] that only the citizenship of those who are "real and substantial

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[10] A business trust is a voluntary association which possesses many of the attributes of a corporation without formal incorporation and its attendant statutory regulation. The Supreme Court has defined the business trust as:

> a form of business organization . . . consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided.

Hecht v. Malley, 265 U.S. 144, 146-47 (1924).

[11] The real parties to the controversy terminology first appeared in *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421 (1823). Addressing the issue of joinder of parties in a suit involving actions by a trustee allegedly constituting a breach of trust, the *Wormley* Court stated:

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parties to the controversy" determines diversity jurisdiction. *Id.* at 460. It held that the citizenship of the beneficial shareholders, who retained severely restricted powers of intervention and control, was irrelevant, and that the trustees possessed the right to invoke the diversity jurisdiction of the federal court on the basis of their own citizenship. *Id.*

The Court implicitly refused to extend its decision beyond this particular type of unincorporated association. However, despite this limitation to business trusts, the majority's interpretation of the real parties to the controversy doctrine is applicable to determinations of diversity jurisdiction involving other unincorporated associations, including modern limited partnerships. The Supreme Court in *Navarro* made no comment on the specific issue of the citizenship of limited partnerships. However, the Court acknowledged that determining the identity of the real parties to the controversy before diversity of citizenship can be decided was hardly novel:

> Early in its history, this Court established that the "citizens" upon whose diversity a plaintiff grounds

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> This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others.

Id. at 451 (footnote omitted). *See also Susquehanna & Wyo. Valley R.R. & Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172, 177 (1871); *Marshall*, 57 U.S. (16 How.) at 328-29; *McNutt v. Bland*, 43 U.S. (2 How.) 9, 15 (1844).

> jurisdiction must be real and substantial parties to the controversy. Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.

Id. at 460-61. (citations omitted).

Applying the real parties to the controversy test, the Supreme Court concluded "that these respondents are active trustees whose control over the assets held in their names is real and substantial. . . . They have legal title; they manage the assets; they control the litigation. In short, they are real parties to the controversy." *Id.* at 465.

Justice Blackmun dissented from the opinion of the Court but noted that he only disagreed with the result of the real parties to the controversy analysis, not the analytical approach. *See id.* at 466-77. Justice Blackmun also indicated that he found the Fifth Circuit's reasoning persuasive in distinguishing *Bouligny* and other cases:

> The Court of Appeals in this case recognized the pertinence of Bouligny to the problem presented here, but found that case distinguishable. It noted that Bouligny is directly applicable only to the situation in which an unincorporated association seeks to establish diversity jurisdiction as an entity. And it adopted the view, earlier suggested in law review commentary, that Bouligny did not decide who the relevant members are when a court determines the citizenship of an unincorporated association. The Court of Appeals concluded that when an organization has more than one class of members, it is necessary to determine on a case-by-case basis which class comprises the real parties in interest. . . . I believe that the approach of the Court of Appeals in this case was consistent with this Court's prior decisions.

Id. at 474-75 (Blackmun, J., dissenting) (footnote and emphasis omitted).

While the *Navarro* majority did not mention the Fifth Circuit's[12] analogy between the business trust involved in the case and a limited partnership, the Court did not reject the position that the business trust shares some of the same attributes as a limited partnership. Furthermore, in affirming the reasoning of the Fifth Circuit, the Supreme Court did not indicate that its real parties to the controversy rationale would be limited to business trusts and not applied to limited partnerships. Additionally, application of a real parties analysis to limited partnerships, in which the rights and responsibilities of the general partners and limited partners are statutorily defined, would be less complicated than applying that test on a case-by-case basis to contractually organized business trusts such as the one found in *Navarro*. *See* Note, *Who are the Real Parties in Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?*, 61 Wash. U.L.Q. 1051, 1065 (1984).

II. DIVERSITY JURISDICTION AND THE MODERN LIMITED PARTNERSHIP

The first appellate court to address the issue of citizenship of a modern limited partnership was the Second Circuit in *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178

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[12] *See Lee v. Navarro Sav. Ass'n*, 597 F.2d 421, 425 (5th Cir. 1979), *aff'd*, 446 U.S. 458 (1980).

(2d Cir. 1966), *cert. denied*, 385 U.S. 817 (1966).[13] In *Colonial Realty*, the court acknowledged the rule established in *Great Southern*, but concluded that only the citizenship of the general partners was relevant for purposes of determining diversity jurisdiction. Judge Friendly, writing for the court, based his conclusion on a provision of the New York Partnership Law identical to the Uniform Limited Partnership Act which provided that a limited partner was not a proper party to proceedings by or against a limited partnership unless the suit was one to enforce the limited partner's rights against or liability to the partnership. *See* N.Y. Partnership Law §115 (McKinney 1978) (amended 1968). *See also* Uniform Limited Partnership Act §26 (1916). Because the New York statute provided that a limited partner lacked capacity to sue on behalf of the limited partnership, the court held that identity of citizenship between the plaintiff and a limited partner did not destroy jurisdiction properly founded upon complete diversity between the plaintiff and each general partner. *Id.*

In *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986), the Fifth Circuit followed the reasoning set forth by this Court in *Navarro* and the result in *Colonial Realty* and held that only the citizenship of the general partners was relevant to determine diversity jurisdiction. While the Fifth Circuit applied the real parties to the controversy test set forth in

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[13] It is interesting to note that of all the cases dealing with the issue of citizenship of the modern limited partnership, this case is the only one in which an application for certiorari was filed with this Court.

Navarro, it recognized the concept set forth in *Colonial Realty* of "two distinct classes of members one of which has no place in the dispute" and acknowledged that both methods had "essentially the same reasoning under . . . different label[s]." *Id.* at 240-41. The *Mesa* court followed *Navarro* by distinguishing *Chapman* and *Great Southern* as "early cases" that were clearly concerned with entities which were quite different than the modern limited partnership with two separate and distinct classes of members. The court also distinguished *Bouligny* which dealt with the question of whether a labor union could itself be treated as a separate citizen for diversity purposes. Unlike *Mesa* and *Navarro*, the *Bouligny* labor union did not involve two separate classes of members that could be differentiated. The *Mesa* court also noticed that *Bouligny*, like the early cases, did not have a single class with exclusive control "based on contract (or statute) setting forth permanent rights, powers and obligations as granted to the trustees in *Navarro* and to the general partners here." *Id.* at 241. Finally, the *Mesa* court dismissed the concerns in other circuits that including only the citizenship of the general partners somehow expanded diversity jurisdiction without congressional authorization by claiming that such arguments were "more semantics than principles." *Id.* The Court concluded:

> An attempt to create a new type of citizen would, of course, expand jurisdiction. Here we are dealing only with which already extant citizens are involved in the case; the issue here is merely a necessary interpretation of existing law.

Id. at 241-42.

A majority of commentators and a large number of courts are in accord with the rule announced by the Second Circuit in *Colonial Realty* and followed by the Fifth Circuit in *Mesa*.[14]

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[14] *See* Note, *Who are the Real Parties in Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?*, 61 Wash. U.L.Q. 1051 (1984); Note, *The Citizenship of Limited Partnerships for Purposes of Federal Diversity Jurisdiction*, 47 Cin. L. Rev. 301 (1978); Note, *Limited Partnerships in Diversity: The Effect of Rule 17(b) on Federal Jurisdiction*, 6 Fordham Urb. L.J. 271 (1978); Note, *Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 Tex. L. Rev. 243 (1978); Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U. Chi. L. Rev. 384 (1978); Note, *Federal Jurisdiction – Diversity of Citizenship – The Citizenship of Limited Partners Must be Considered in Determining Whether Diversity Jurisdiction Exists – Carlsberg Resources Corp. v. Cambria Savings & Loan Association, 554 F.2d 1254 (3d Cir. 1977)*, 46 Geo. Wash. L. Rev., 657 (1978); Note, *Carlsberg Resources Corp. v. Cambria Savings & Loan Association: Diversity Jurisdiction and the Limited Partner*, 1 Det. C.L. Rev. 177 (1978); Note, *Federal Civil Procedure – Diversity Jurisdiction – Identity of Citizenship Between Defendants and some Limited Partners in Plaintiff Partnership Precludes Federal Jurisdiction Based on Diversity of Citizenship – Carlsberg Resources v. Cambria Savings & Loan Association, 554 F.2d 1254 (3d Cir. 1977)*, 27 Emory L.J. 165 (1978); Note, *Federal Courts – Diversity of Citizenship Jurisdiction – Limited Partnerships*, 16 Duq. L. Rev. 221 (1977-78); Note, *Diversity Jurisdiction and Limited Partnerships*, 1977 B.Y.U.L. Rev. 661 (1977); Note, *Carlsberg Resources v. Cambria Savings & Loan Ass'n: Limited Partners and Diversity Jurisdiction*, 13 Tulsa L.J. 304 (1977). *See also Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986); *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880 (2d Cir. 1970), *cert. denied*, 400 U.S. 993 (1971); *Petroleum Data Services, Inc. v. First City Bancorporation of Texas, Inc.*, 622 F.Supp. 1022 (D. Kan. 1985); *Westville Holdings, Inc. v.*

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However, the Third Circuit in *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254 (3d Cir. 1977), explicitly rejected the *Colonial Realty* holding. The court based its decision on the *Chapman, Great Southern,* and *Bouligny* line of cases and regarded them as a mandate to include the citizenship of all members of all unincorporated associations. *Id.*

The *Carlsberg* holding was reaffirmed by the Third Circuit, post *Navarro,* in *Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29 (3d Cir. 1981). The Fourth, Seventh, and Eighth Circuits also appear to follow the holding in *Carlsberg*. *See New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015 (4th Cir. 1985); *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984); and *Stouffer Corp. v. Breckenridge*, 859 F.2d 75 (8th Cir. 1988). Those cases employed a "bright-line" test which classifies limited partnerships as unincorporated associations and requires consideration of the citizenship of all members for diversity purposes. That "approach

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American Petroleum Partners, 592 F.Supp. 44 (S.D.N.Y. 1984); *Wroblewski v. Brucher*, 550 F.Supp. 742 (W.D. Okla. 1982); *Sixth Geostratic Energy Drilling Program 1980 v. Ancor Exploration Co.*, 544 F.Supp. 297 (N.D. Okla. 1982); *Williams v. Sheraton Inns, Inc.*, 514 F.Supp. 22 (E.D. Tenn. 1980); *Rocket Oil & Gas Co. v. Arkla Exploration Co.*, 435 F.Supp. 1303 (W.D. Okla. 1977); *C.P. Robinson Const. Co. v. National Corp. for Housing Partnerships*, 375 F.Supp. 446 (M.D.N.C. 1974); *E ning v. Virginia Squires Basketball Club*, 349 F.Supp. 709 (E.D.N.Y. 1972), *aff'd*, 468 F.2d 1064 (2d Cir. 1972); *Sands v. Geller*, 321 F.Supp. 558 (S.D.N.Y. 1971); *Garfield & Co. v. Wiest*, 308 F.Supp. 1107 (S.D.N.Y. 1970), *aff'd*, 432 F.2d 849 (2d Cir. 1970), *cert. denied*, 401 U.S. 940 (1971).

fails to recognize the unique character of . . . [modern] limited partnerships – neither corporation nor association, but a hybrid between the two." *Stouffer Corp. v. Breckenridge*, 859 F.2d at 78 (Ross, J., dissenting), *citing Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d at 240. *See also Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d at 1263 (Hunter, J., dissenting) (the modern limited partnership is "a unique business entity," and as such has "peculiar and distinct" characteristics).

The Third, Fourth, Seventh, and Eighth Circuits applied prior Supreme Court holdings limited to joint stock companies (*Chapman*), nearly ancient limited partnership associations (*Great Southern*), and labor unions (*Bouligny*).[15] The approach taken by these circuit courts of appeals fails to properly interpret the evolution of this Court's holdings in *Chapman, Great Southern, Bouligny, Russell,* and *Navarro* with respect to the treatment of different types of unincorporated associations.

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[15] Furthermore, *Chapman* and *Great Southern*

> stand only for the rule that unincorporated common law business associations with only one class of members, all of whom may participate in the management of the business, are citizens, for diversity purposes, of all the states wherein their members are citizens. But these cases have no application to members of a second class within the association who cannot participate in the management of its business.

Wroblewski v. Brucher, 550 F.Supp. at 751.

III. THE MODERN LIMITED PARTNERSHIP – A SOPHISTICATED BUSINESS ENTITY – A COMPARISON TO OTHER TYPES OF BUSINESS ENTITIES

A limited partnership is formed by compliance with statutory requirements.[16] It consists of (a) general partners who manage the business and have the same liability as partners in an ordinary partnership and (b) limited partners, who do not take part in management, but who share profits, although not losses beyond their capital contributions. Furthermore, a limited partner may forfeit his limited liability by taking part in the control or management of the limited partnership. *See* J. Crane & A. Bromberg, *Law of Partnership* at 143. The Uniform Limited Partnership Act (1916) imposes the following limitations upon limited partners: "A limited partnership is a partnership formed by two or more persons . . . having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership." Uniform Limited Partnership Act §1 (1916); "The surname of a limited partner shall not appear in the partnership name, unless. . . ." *Id.* at §5(1); "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." *Id.* at §7; "A contributor, unless he is a general partner, is not a proper

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[16] Every state (except Louisiana which incorporates component parts) has adopted either the Uniform Limited Partnership Act (1916), the Uniform Limited Partnership Act (1976), the Uniform Limited Partnership Act (1976) (amended 1983), or the Uniform Limited Partnership Act (1976) (amended 1985).

party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or a liability to the partnership." *Id.* at §26.

The Uniform Limited Partnership Act (1976) (amended 1983) imposes the following limitations upon limited partners: "The name of each limited partnership as set forth in its certificate of limited partnership: (2) may not contain the name of a limited partner unless. . . ." Uniform Limited Partnership Act §102(2) (1976) (amended 1983); "Except as provided in Subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. *Id.* at §303(a); "A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." *Id.* at §1001.

The Uniform Limited Partnership Act (1976) (amended 1985), contains the same substance as the 1976 Act with the 1983 amendments except that the language of section 303 has been slightly modified.

Limited partnerships have become an important aspect of our business society. The publicly traded limited partnership, a form of limited partnership, has emerged as a financial alternative to the public corporation. "[A] publicly traded limited partnership is an operating business or a pool of assets in a partnership form registered with the SEC and traded in public markets."

Publicly Traded Limited Partnerships: An Emerging Financial Alternative to the Public Corporation, 39 Bus. Law. 709-10 (1984). The public limited partnership is currently popular because it addresses valuation mismatches that have occurred when dealing with corporations. Public limited partnerships are part of a larger trend and have been referred to by one commentator as the "devolution of corporate assets into direct ownership." *Id.* at 710. From 1974 to 1984, over forty-seven billion dollars worth of public limited partnerships had been filed with the National Association of Securities Dealers. *Id.* at 717. Many limited partnerships consist of hundreds or thousands of limited partners. The sole purpose of this type of entity is to raise capital. Members of the partnership have no idea who the other limited partners are and have no reason to care. Furthermore, third parties do not know the identity of the limited partners and have no reason to know because limited partners are only considered for the capital they contribute. *Id.* at 733.

Limited partnerships are used as investment vehicles because of their ability to utilize various tax losses and deductions generated by the partnership to offset income from other sources. *See* Aslanides, Cardinali, Haynsworth, Lane and Niesar, *Limited Partnerships – What's Next and What's Left?*, 34 Bus. Law. 257, 258 (1978). Limited partnerships have been involved in ventures including real estate development; oil and gas drilling; farming operations, including vineyards, fruit, and nut groves; timber development; cattle raising and feeding operations; sheep ranching; chinchilla breeding; oyster farming; theater, film, and television productions; sports

franchises; equipment leasing; venture capital companies; individual and chain restaurants; hotels and motels; estate planning; and research and development companies during the period in which they are operating at a loss.

> "[L]imited partnerships can be appropriate for any type of operating business where the success of the venture is not dependent on retaining large operating profits in the business for further expansion or in the formative stages before a particular business becomes too profitable to justify the use of the partnership form due to the tax situation of the individual partners."

Id.

As mentioned above, the modern limited partnership is significantly different than the unincorporated associations examined in the early cases. The joint stock company in *Chapman* and the limited partnership association in *Great Southern* were merely voluntary associations comprised of "mere collections of individuals" who also had the power to "sue in their collective name." *Navarro Sav. Ass'n v. Lee*, 446 U.S. at 461. The unincorporated associations in these early cases were not statutorily created and had only one class of partner. Clearly the modern limited partnership is significantly different. It contains two separate and distinct classes of members, one of which has near exclusive control of the assets and the legal and business decisions.

The modern limited partnership is also quite different than the labor union in *Bouligny*. In *Bouligny*, as in *Chapman* and *Great Southern*, there was no separate class of member with exclusive control of the management and assets of the labor union. Unlike the modern limited

partnership, the labor union in *Bouligny* did not have a contract or statute which set forth permanent rights, powers, and obligations similar to those granted to general partners in the modern limited partnership. Furthermore, there were obvious problems in fashioning a test to ascertain the citizenship for the labor union because of its local and national flavor.

On the other hand, the modern limited partnership is quite similar to the corporation. Both shareholders and limited partners share in the profits but are subordinated to the claims of outside creditors. Both enjoy limited liability and both have delegated management of their interests to others. The only major practical differences between a modern limited partnership and a corporation are that the limited partnership is a less flexible form of investment because its purposes must be specifically delineated in its charter, and that the two forms of organizations enjoy significantly different tax treatment. However, many corporations are taxed like partnerships if they satisfy the criteria of Subchapter S of the Internal Revenue Code, I.R.C. §§1361-79 (1986).

The courts have noted that the characteristics of limited partners make them significantly more like shareholders than general partners. *See, e.g., Klebanow v. New York Produce Exch.*, 344 F.2d 294, 297 (2d Cir. 1965); *Ruzicka v. Rager*, 305 N.Y. 191, 197-98, 111 N.E.2d 878, 881 (N.Y. 1953).

The modern limited partnership is also similar in many ways to the business trust. Some of the elements of control that might cause a limited partner to become a general partner and lose his limited liability might also

cause a beneficial shareholder to become a principal of the trust and lose his limited liability. *See* R. Rowley & D. Sive, 2 *Rowley on Partnership* 633 (2d ed. 1960).

The powers of the trustees are very similar to those of general partners in a limited partnership. In *Navarro*, the Court found that the trustees of the business trust "ha[d] legal title; they manage[d] the assets; they control[led] the litigation." *Navarro Sav. Ass'n v. Lee*, 446 U.S. at 465. Article III of the Declaration of Trust gave the trustees the "full, absolute and exclusive control and authority over the Trust Estate and of the business and affairs of the Trust. . . ." *Lee v. Navarro Sav. Ass'n*, 597 F.2d at 424. General partners also manage the assets, control the litigation, and bear the risk of liability for the limited partnership's debts. *See generally* Uniform Limited Partnership Act (1916) and Uniform Limited Partnership Act (1976).

Conversely, the beneficial shareholders in *Navarro*'s trust "had no voice in the initial investment decision . . . [could not] control the disposition of . . . [the] action nor intervene in the affairs of the trust except in the most extraordinary situations." *Navarro Sav. Ass'n v. Lee*, 446 U.S. at 464-65. (footnote omitted). Similarly, limited partners have limited control over the partnership, cannot bring an action on behalf of the partnership unless it is a derivative action in which the partners have refused to act, and have limited liability. *See generally* Uniform Limited Partnership Act (1916) and Uniform Limited Partnership Act (1976).

The modern limited partnership is also similar in many respects to the *sociedad en comandita*. *Compare* "Its

members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §26 (1916) and Uniform Limited Partnership Act §1001 (1976) (the limited partner does not have authority to bring suit on behalf of the limited partnership except in extraordinary circumstances). *Compare* "It is created by articles of association filed as public records." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §2(1)(b) (1916) and Uniform Limited Partnership Act §201(a) (1976) (requiring certificate to be recorded). *Compare* "Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §2(1)(a)V, §20 (1916) and Uniform Limited Partnership Act §201(b), §801 (1976) (period of limited partnership's duration). *Compare* "Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §2(1)(a)IV (1916) and Uniform Limited Partnership Act §201(a)(3) (1976) (certificate must designate general partners); and Uniform Limited Partnership Act §9, §10 (1916) and Uniform Limited Partnership Act §§301-405 (1976) (rights of general and limited partners). *Compare* "Its members are not primarily liable for its acts and debts. . . ." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §7 (1916) and Uniform Limited Partnership Act §303 (1976) (limited

liability of limited partners). *Compare* "[I]ts creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital." *Puerto Rico v. Russell & Co.*, 288 U.S. at 481, with Uniform Limited Partnership Act §22, §23(1)(a) (1916) and Uniform Limited Partnership Act §502(b), §607, §703, §804 (1976) (preferred status of creditors of limited partnership).

IV. POLICY CONSIDERATIONS

The legislative history concerning the adoption of diversity jurisdiction in both the Constitution and the Judiciary Act of 1789 is disappointingly scant. Some opposition to it was expressed even among the founding fathers, but little recorded rationale for its support has been preserved. *See* Friendly, *The Historic Basis Of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928). Chief Justice Marshall alluded to "fears and apprehensions" on the part of aliens or citizens of different states who would otherwise find themselves before state tribunals. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) at 87. Justice Storey mentioned "state prejudices, state jealousies, and state interests . . . " as reasons for diversity jurisdiction. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). *See also* J. Elliot, *The Debates on the Federal Constitution* (2d ed. 1859).

Reasons for diversity jurisdiction include: avoidance of local prejudice to out-of-state litigants by making available the benefits and safeguards of the federal

courts, encouragement of commercial investment, availability of federal procedural advantages, and achievement of uniformity of decision in commercial law, conflicts of law, and international law. *See generally* American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* at 99-110, 458-64; Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928); Moore and Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. 1426, 1445-51 (1964); Note, *Federal Diversity Jurisdiction – Citizenship for Unincorporated Associations*, 19 Vand. L. Rev. 984, 987-89 (1966).

Limited partnerships are among those business organizations for which diversity jurisdiction was created as a protection. These organizations have a functionally similar structure with other types of organizations that have access to federal courts such as corporations, business trusts, and the *sociedad*. Considerations of basic fairness and substance over form require that limited partnerships receive similar treatment. Therefore, limited partnerships should be granted citizenship for diversity purposes either as an "entity" by using the *Marshall* rationale or by considering only the citizenship of the general partners under the real parties to the controversy rule set forth in *Navarro*. Furthermore, any arguments to the contrary based on judicial economy should be dismissed. The fact that certain federal courts may not want to take on a possibly increased workload is not a sufficient reason to restrict access to the federal courts. "Serious questions of judicial integrity would be raised if questions of workload and the size of the federal docket were given undue

emphasis in making jurisdictional determinations." Note, *Diversity Jurisdiction and Limited Partnerships*, 1977 B.Y.U.L. Rev. at 672.

Because similar entities should receive similar treatment, this Court in *Navarro* sent a clear message that the federal courts are required to look beyond "the superficial contours of a business entity to define the real parties to the controversy." *Stouffer Corp. v. Breckenridge*, 859 F.2d at 78 (Ross, J., dissenting).

V. APPLICATION OF THE REAL PARTIES TO THE CONTROVERSY TEST TO THIS CASE

Arkoma Associates is an Arizona limited partnership, governed by the Uniform Limited Partnership Act which that state has adopted and which is substantially similar to the Uniform Limited Partnership Act (1976).[17] The Act provides, as a matter of law, that "a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or,

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[17] Petitioners try to attach significance to the fact that under Arizona law, Arkoma Associates is not a juridical person, having an existence separate and apart from its members. Brief of Petitioners, p. 10. As such, petitioners argue that Arkoma Associates cannot be considered a citizen of Arizona in the same way an Arizona corporation would be granted entity status. *Id.* However, this narrow view ignores the argument for the application of the real parties to the controversy test to determine diversity jurisdiction. Furthermore, this argument also assumes that this Court has already determined that a limited partnership may not be granted entity status like a corporation based on the reasoning developed in *Letson* and *Marshall* and codified in 28 U.S.C. §1332(c).

in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." Ariz. Rev. Stat. Ann. §29-318 (1982). The Act also limits a limited partner's right of action as follows: "A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." *Id.* at §29-356.[18]

Analysis of the Limited Partnership Agreement of Arkoma Associates[19] mandates that under the real parties

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[18] Petitioners argue that the Arkoma Associates' position is somehow weakened because Ariz. Rev. Stat. Ann. §29-326 (repealed 1982), which mirrored Uniform Limited Partnership Act §26 (1916), has been repealed. However, capacity to sue is but one element of control to be examined in the application of the real parties to the controversy test. Furthermore, Ariz. Rev. Stat. Ann. §29-356 provides limited partners with capacity to sue only in a derivative action whereby the limited partners bring an action on behalf of the limited partnership to recover a judgment in its favor if the general partners have refused to bring such an action or if an effort to force the general partners to do so would not likely succeed. Other than in this limited circumstance, the limited partners do not have the capacity to file suit on behalf of the limited partnership or to carry on any of the management functions conducted by the general partners. While Ariz. Rev. Stat. Ann. §29-356 arguably grants the limited partners somewhat greater access to the courts than granted in §29-326 (repealed 1982), it in no way empowers the limited partners with the right to control, manage, or transact any business for the partnership, the very factors that cause the general partners to be the real parties to the controversy.

[19] The Limited Partnership Agreement of Arkoma Associates and the amendments thereto appear in full on pages 70-97 of the Joint Appendix.

to the controversy test, the general partners constitute such real parties for purposes of diversity jurisdiction. Article 6.1 of the agreement provides that the general partners have exclusive and complete management and control of the operations of the partnership and have the power to do anything necessary to further the purposes of the partnership. Article 6.1(a) through (m) contains a non-exclusive list of those powers. In addition, article 6.3 grants the general partners specific authority to lease or sell any partnership property under such terms as the general partners deem proper. With regard to the accounting practices of the limited partnership, article 5.1 grants the general partners absolute discretion to select the method to be used to calculate depreciation of any depreciable assets of the partnership.

Petitioners argue that the citizenship of the limited partners should be considered for diversity jurisdiction purposes because they own ninety-nine percent of the assets of Arkoma and because "[t]hey may veto the sale of partnership assets and control the use of the proceeds of such sales." Brief of Petitioners, pp. 8-9. However, article 7.1 of the limited partnership agreement clearly provides that the limited partners do not have the right to control, manage, or transact any business for the partnership, or the power to sign for or bind the partnership in any business transactions. Article 7.1 also provides that the limited partners cannot be personally liable for any debts or losses of the partnership or of the general partners.

While the limited partners do compromise the majority interest of the partnership, petitioners' interpretation of their power to veto the sale of assets and to control the

use of those proceeds is overstated. In actuality, the limited partners have few significant rights and powers, none of which are related to the management of the limited partnership.[20]

The rights and powers granted to the limited partners are negligible when compared to the overwhelming scope of control maintained by the general partners. Furthermore, the rights and powers granted to the limited partners do not involve control or management of the limited partnership or the transaction of any business on behalf of the limited partnership. Those rights and powers are exercised exclusively by the general partners. Accordingly, the general partners are the only real parties to the controversy.

VI. RELIEF REQUESTED

Respondent Arkoma Associates respectfully requests this Court to affirm the judgment of the Fifth Circuit Court of Appeals based on either the entity status granted to a corporation and a *sociedad*, or the real parties to the controversy test applied by this Court in *Navarro*. In the alternative, should this Court reverse the Fifth Circuit Court of Appeals, respondent submits that the dismissal of intervenor Magee Drilling Company's complaint of intervention, as amended, should be affirmed on the grounds and for the reasons that complete diversity of citizenship existed between Magee Drilling Company,

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[20] *See generally* Limited Partnership Agreement of Arkoma Associates, articles 6.2(g), 7.3(a) and (b), 7.4, 8.1, 8.2, and 9.1(a) and (e). *Compare with* articles 6.1(a)-(m) and 7.1.

a citizen of the State of Texas, and all of the partners and limited partners of Arkoma Associates. *See* Second Certificate of Amendment to the Limited Partnership Agreement of Arkoma Associates, Joint Appendix, pp. 93-97. Federal courts have long held that an intervention will be treated as a separate action if it is permissive and there is an independent basis for jurisdiction of the intervenor's claim. 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* §1917 at 457-59, §1920 at 491 (1986). *See also Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675-76 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); *Donovan v. Oil, Chemical, and Atomic Workers Int'l Union*, 718 F.2d 1341, 1351 (5th Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *McKay v. Heyison*, 614 F.2d 899, 907 (3d Cir. 1980); *Magdoff v. Saphin Television & Appliance, Inc.*, 228 F.2d 214, 215 (5th Cir. 1955); *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954); *Alabama Electric Coop., Inc. v. United States*, 574 F.Supp. 27, 31 n. 8 (M.D. Ala. 1983); *Equal Empl. Oppor. Comm'n v. International Bhd. of Elec. Workers*, 506 F.Supp. 480, 483 (D. Mass. 1981); *Kruse v. Zenith Radio Corp.*, 82 F.R.D. 66, 69 (W.D. Pa. 1979).

Thus, even under petitioners' theory of diversity jurisdiction, independent jurisdictional grounds existed for the complaint of intervention filed by Magee Drilling Company. These issues, along with all other issues, were tried to the district court (Joint Appendix, p. 67) and affirmed by the Fifth Circuit Court of Appeals (Joint Appendix, p. 69).

VII. CONCLUSION

Fundamental fairness and uniformity of treatment to similar entities mandate that Arkoma Associates, a modern limited partnership, have access to the federal courts through diversity jurisdiction. There is no logical reason to foreclose Arkoma Associates from such access. Because Arkoma Associates is analogous to a corporation and a *sociedad en comandita*, in order for diversity standards to be truly uniform, Arkoma Associates must be given the entity status granted to the corporation and the *sociedad*.

Alternatively, because Arkoma Associates is also analogous to a business trust, the real parties to the controversy test applied by this Court in *Navarro* should be applied in this case. Under such test, only the citizenship of the general partners of Arkoma Associates, the real parties to the controversy, would be considered for purposes of diversity jurisdiction.

Reliance on *Chapman* and *Great Southern*, turn of the century cases dealing with antiquated unincorporated associations, and *Bouligny*, clearly distinguishable because of the national as well as local flavor of its labor union, is no longer appropriate. Now is the time to grant the modern limited partnership the access to the federal courts through diversity jurisdiction that it deserves.

Respectfully submitted:

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